No. 91-1625

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER TO BRIEF IN OPPOSITION FOR RESPONDENTS FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION

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The Cain Partnership, Ltd. (hereinafter "Partnership") received the brief in opposition (hereinafter "Respondents' Brief") from Fleet National Bank, First National Bank Of Louisville and First Tennessee Bank National Association (hereinafter "Respondents").

REPLY ONE: SEPARATION OF POWERS

Respondents' Brief states as follows at 12:

> The Constitution does not prohibit Congress from allowing bankruptcy courts to determine whether a proceeding is core or noncore. Courts often determine their own jurisdiction. (citation omitted) The decision by the bankruptcy court is appealable. Prior to a decision by the bankruptcy court, a party also has the option of making a motion in district court to withdraw the reference to the bankruptcy court. (citation omitted) . . .
>
> Petitioner's argument that . . . "core" and/or "public rights" is too nebulous for bankruptcy courts . . . does not bear scrutiny. The same argument could be made for other areas of constitutional law such as personal jurisdiction over nonresident defendants. Though it may be a difficult area of law, lower courts make these determinations daily.

What is quoted above is the only response to the question stated in the Petition as follows:

> Is the 28 U.S.C. § 157(b)(3) congressional grant of jurisdiction, to a non-Article III bankruptcy judge, to determine whether it or an Article III

district judge must adjudicate the merits of a proceeding, a violation of Article III of the Constitution?

Respondents' objection hopes the Court, unaware, will indulge an unstated presupposition. That is, bankruptcy courts are to be viewed as if presided over by Article III judges. To say of an Article III judge that he/she has the power to decide which, as between the district judge or the bankruptcy judge has jurisdiction, does not evoke any alarm that the constitutional boundaries of Article III would, thereby, be unlawfully crossed. But, to say, as Congress has, that a non-Article III bankruptcy judge must decide whether to permit the Article III district judge to exercise jurisdiction evokes alarm that Article III would, thereby, be evaded. The error on which Respondents would have the Court act is to presume of bankruptcy courts what, when presumed of courts presided over by Article III judges, would be of no moment.

By 28 U.S.C. § 157(b)(3), Congress has mandated, with respect to all cases referred by a district court to a bankruptcy judge pursuant to 28 U.S.C. § 157(a), that a non-Article III judge be the initial adjudicator of whether an Article III judge has jurisdiction over a proceeding. Neither the bankruptcy judge nor any Article III judge is given a choice about either (1) who will or (2) whether to so adjudicate.

Once a bankruptcy case is referred to a bankruptcy judge the decision as to whether any proceeding therein is "core" or not is *vested* by Congress in the bankruptcy judge, and the district court is without jurisdiction to withdraw this critical decision from the bankruptcy judge. Whether an Article III district judge even gets the opportunity to pass on whether it has jurisdiction over the proceeding is wholly dependent on whether the non-Article

III bankruptcy judge lets the district court.

Unless the non-Article III bankruptcy judge decides that the proceeding is noncore, the Article III district court judge has no say in the matter and, simply, must take a back seat and await adjudication of the merits by the non-Article III bankruptcy judge. The Article III district judge, after a bankruptcy judge decides that a "proceeding," which a litigant has no choice other than to file before the bankruptcy judge, is a "core" proceeding, is reduced to a role of an appeal court only.

Once a district court has referred a *case* to a bankruptcy judge, the district court *may*, but is not required to, withdraw the referral but only "*for cause shown.*" 28 U.S.C. § 157(d). A district court would not have "cause" to withdraw a reference because a bankruptcy judge does that which the bankruptcy judge is mandated by Congress [§ 157(b)(3)] to do.

If the district court never referred the case to a bankruptcy judge, the mandate of § 157(b)(3) would never take effect. However, the instant is a case which was referred. Additionally, by Local Rule (Petition p. 16), the district court below generally refers all bankruptcy cases to the bankruptcy judge. This is the local rule in all districts.

The referral and withdrawal provisions of § 157(a) and (d) are a facade to legitimate that which is, in practice, illegitimate. If district courts made no referrals to bankruptcy judges, the whole bankruptcy system would wither away.

Bankruptcy judges, though they might be helpers of the judiciary, are not within the Judicial Branch. What Congress has set up by § 157(b)(3) is a system whereby a person not within the Judicial Branch makes the determination of whether litigants shall have access to the Judicial Branch. While it is true that every

judge within the Judicial Branch must have jurisdiction to determine whether he/she has jurisdiction, for the Judicial Branch to be preserved as an independent and separate branch of government, the opportunity for judges within the Judicial Branch to pass on whether they have jurisdiction must be reserved for such judges only and alone.

If Congress is constitutionally able to set up a gatekeeper outside the Judicial Branch, *e.g.*, a bankruptcy judge, to determine who may and who may not pass through into the Judicial Branch, the Judicial Branch no longer is a separate and independent branch as must be the case for the structure of our government. *Buckley v. Valeo*, 424 U.S. 1, 120 (1976); *Chadha v. INS*, 634 F.2d 425 (9th Cir. 1980), *aff'd*, ____ U.S. ____, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). Instead, Congress will have created the way to conquer the judiciary by simply reserving to a person outside the Judicial Branch the decision as to whether the Judicial Branch shall or shall not be given opportunity from case to case, to adjudicate.

Today, bankruptcy courts are presided over by most competent jurists. The Partnership does not argue from a presumption that bankruptcy judges, as human beings, are less able than district judges. It is simply a matter of on which side of the boundary, separating the Judicial Branch from the other Branches, Congress has placed bankruptcy judges which is determinative.

A colloquial illustration may serve better to make the point. It is as if Congress has required the fox to make the initial determination as to whether the fox or the farmer has jurisdiction over the chicken, considering each chicken one at a time. Telling the chickens not to worry because, if the fox decides that the fox has jurisdiction, once the fox is finished, the chicken may appeal to the farmer, is no cure.

If, on appeal to the district court, the non-Article III bankruptcy judge is reversed, the litigant who has been forced to spend himself before a tribunal with no jurisdiction may have yet another appeal to a court of appeals and a petition to the Court before getting back to retry the case before a court with jurisdiction. This is a damage which cannot be reversed by a favorable ruling on appeal. Only a certain percentage of litigants could survive to get a second bite at the cherry.

It certainly is true that an inherent flaw which must be tolerated in our judicial system is that trial judges are apt initially to make erroneous decisions about jurisdiction. However, the minimal requirements of due process dictate that the litigant be given the initial decision concerning jurisdiction by a judge within the Judicial Branch and not by a non-Article III gatekeeper.

REPLY TWO: SIXTH CIRCUIT MANIPULATION

The question (Pet. p. II) involves the bankruptcy court's ruling that the proceeding below was core which the Sixth Circuit, for the first time, declared to be was noncore. Then, proceeding on its noncore rationale, the Sixth Circuit affirmed the judgment below even though the Partnership was never given the opportunity to elect how to litigate, knowledgeable, as anticipated by 28 U.S.C. § 157(c)(2), that the proceeding was noncore.

Pointing out that the Eleventh Circuit, in *In re: Davis*, 899 F.2d 1136 (11th Cir. 1990), had rejected such reasoning, the Partnership explained what the Sixth Circuit did (Pet. pp. 25-27) by gutting what had transpired below but, nonetheless, affirming. This unprecedented approach by the Sixth Circuit is already being emulated. *See In the Matter of: Sabec*, 137 B.R. 659 (Bkrtcy W.D. Mich. February 25, 1992); *In The Matter Of: Holly's Inc.*, 1992 Bankr. LEXIS 617 (W.D. Mich. April 28, 1992).

The Respondents repeatedly insist that, in spite of what the Sixth Circuit said, the proceeding below was core (Respondent's Brief pp. 3, 9, 11).

Respondents, in essence, concede that the Sixth Circuit was wrong. But, Respondents are attempting to cover up for this substantial error.

REPLY THREE: NONCORE

Respondents consider that convincing the Court that the Sixth Circuit agreed with the district court that the proceeding was "core" is critical to the tenets of Respondents' argument. In an effort to make this point, Respondents' Brief (pp .2, 5, 6, 13) repeatedly states that the Sixth Circuit did *not* consider the proceeding noncore.

The two best ways to test the genuineness of this assertion is by reference to the precise words of the Sixth Circuit and how other courts have interpreted those words. The Sixth Circuit stated as follows in its opinion (Pet. App. 113a):

> The Bankruptcy Court and the District Court construed the instant proceeding as a core proceeding. Although the instant proceeding is perhaps more properly characterized as a non-core but related proceeding because of the underlying issue involved, (fn. 3) . . . .
>
> * * *
>
> [fn. 3] Appellant's motion is based on rights which could have been brought in state courts had there been no Title 11 bankruptcy case filed. In other words, the question as to the automatic termination of the lease upon breach did not involve any rights

> of either party granted by virtue of the filing of a Title 11 bankruptcy case. Such a strict reading of "core" is *necessitated* by the Supreme Court's holding in *Marathon* (emphasis added).
>
> * * *
>
> [Pet. App. 114a] The actions of appellant amount to an implied consent to have the Bankruptcy Court hear and determine the *instant noncore proceeding* (emphasis added).
>
> [Pet. App. 115a] [w]e conclude that the Partnership . . . consented to the jurisdiction of the Bankruptcy Court to hear and determine *this noncore* but related proceeding (emphasis added).

On March 10, 1992, in the case of *In re: Sav-A-Lot Automotive # 2, Inc.*, Case No. 92-21165-D(rs), the Bankruptcy Court in Memphis filed a document (Appendix A hereto) saying:

> Since the lease termination issue is strictly governed by state law, the court finds that this is a non-core proceeding. See *In re: Pioneer,* 946 F.2d 445 (6th Cir. 1991).

On the same day, in the same case, the same court stated (Appendix B hereto) as follows:

> This court concedes that on a lease termination issue, the bankruptcy court does not have jurisdiction to enter a final order as it is a non-core proceeding. *Pioneer, supra,* [946 F.2d 445 (6th Cir. 1991)].

In two other cases, the bankruptcy court in Michigan (on

February 25, 1992) and the district court in Michigan (on April 28, 1992) have both relied on the opinion of the Sixth Circuit *sub judice* as authority for what, in substance, reduces the fact that the bankruptcy court undertook decision of issues involving exclusively state law, which the courts conceded might have presented a noncore proceeding, to insignificance. The reason given is *consent to jurisdiction implied by silence,* even if it was a noncore proceeding. These courts cited, as controlling their noncore observations, the below ruling of the Sixth Circuit. *See In The Matter Of: Sabec, supra; In The Matter Of: Holly's Inc., supra.*

REPLY FOUR: MISSTATEMENT OF "MAIN ARGUMENT"

Respondents misstate the Partnership's position by contending that its "main argument is that the referral of core proceedings to non-Article III bankruptcy courts is unconstitutional." (Respondents' Brief pp. 2, 8).

If, by "core," Respondents intend proceedings over which a non-Article III bankruptcy judge is constitutionally empowered to adjudicate, the misstatement is mockery.

If, by "core," Respondents mean merely to refer to the list in 28 U.S.C. § 157(b)(2), there is insufficient definiteness to know what limits Respondents mean the word "core" to have. Section 157(b)(2) says of itself that the list is not exclusive; yet, § 157(b)(2) provides not a hint as to what other proceedings may or may not be core. Therefore, if Respondents intend "core" to be a shorthand reference to § 157(b)(2), the Partnership (nor any other person) could say, in advance, whether an adjudication by the bankruptcy court of issues so referred would or would not be unconstitutional.

If, by "core," Respondents intend to communicate that the attempt by Congress, through § 157(b)(2), to empower non-Article

III bankruptcy judges to adjudicate vying claims, determinable exclusively by state (and no other) law, then, the statement is a fair representation of the Partnership's position.

REPLY FIVE: FORUM SHOPPING IMPLICATIONS

If, as Respondents claim and the Sixth Circuit has held, the only prerequisite to jurisdiction of a tribunal (be it one presided over by an Article III judge or a non-Article III judge) is the consent of the parties and no objection by the tribunal, American jurisprudence has been radically changed.

If the law now is that, so long as the court does not refuse to adjudicate, all that is needed for a court to make a binding judgment is the consent of the parties, irrespective of any statute or other law to the contrary or the citizenship of the parties or the amount in controversy, two Florida (picked at random) residents, who consent to the jurisdiction of a bankruptcy judge in Utah, could file a wrongful death action, one against the other and, if the bankruptcy judge agreed to rule, a binding decree could be entered.

On appeal, if either party raised a question about jurisdiction, the appeals court need only cite the decision of the Sixth Circuit below for the proposition that the consent of the parties preempted the issue.

The consent of the parties would reduce to nothingness prior law announced by the Court and the Sixth Circuit [*Freytag v. Commissioner of Internal Revenue*, 501 U.S. __, 115 L. Ed. 2d 764, 791, 111 S. Ct. __ (1991) (Scalia concurring in part); *Insurance Corp. Of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982); *Ambrose v. Welch*, 729 F.2d 1084 (6th Cir. 1984); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *California v. LaRue*, 409 U.S. 109 (1972); *American*

Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951); *In re: Rini*, 782 F.2d 603 (6th Cir. 1986)], which has prevailed for decades, teaching that appellate courts are duty bound to raise the issue of jurisdiction and, on finding no jurisdiction, to vacate all that had preceded.

Since the September 19, 1991 opinion of the Sixth Circuit, all of the mechanisms for legitimized forum shopping are now in place. The Sixth Circuit and its district courts, henceforth, are completely incapacitated in what previously was their ability to short circuit any lower court adjudications made without jurisdiction. Now, the Sixth Circuit and its district courts are mandated to turn a deaf ear to any claim of lack of jurisdiction if the party raising the claim on appeal could be found to have consented.

If the consent is not express, the Sixth Circuit has bound itself and its lower courts to search for anything, including silence, which might be interpreted as an implied consent before taking up the merits of any jurisdictional challenge. If the Sixth Circuit or it lower courts detect something which might qualify as implied consent, each, based on the Sixth Circuit's ruling below, would be bound to reject the jurisdictional challenge out of hand.

Respectfully submitted,

LARRY E. PARRISH
Attorney for Petitioner

APPENDIX A — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION IN *IN RE SAV-A-LOT AUTOMOTIVE #2, INC.*

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

Sav-A-Lot Automotive #2, Inc. Case No. 92-21165-D

Debtor. Chapter 11

MEMORANDUM OPINION AND ORDER DENYING MOTION TO LIFT STAY AND FIXING DATE FOR DEBTOR TO FILE DISCLOSURE STATEMENT AND PLAN

This core proceeding[1] came on to be heard on the motion of Grant and Company ("Grant"), landlord and a creditor of the debtor, seeking to have the section 362 automatic stay lifted, or in the alternative for adequate protection. The issue for judicial determination is whether cause exists to lift the automatic stay, where the owner/landlord obtained a judgment for possession of the leased premises in state court and where debtor filed an appeal but failed to post the statutory bond in the amount of one (1) years rent, but filed a petition in bankruptcy before the order became final. There is also an issue as to whether there was an unexpired lease on the petition filing date. The following shall constitute findings of fact and conclusions of law pursuant to 7052.

---

1. 28 U.S.C. § 157(b)(2)(G).

Appendix A

BACKGROUND FACTS

Grant entered into a lease agreement with the debtor, Sav-A-Lot-Automotive #2, ("herein Sav-A-Lot" or "Debtor") on April 1, 1985, for a three (3) year term for premises at 1979 Covington Pike, Memphis, Tennessee, with options for two (2) successive three (3) year terms. On January 23, 1992, in state court, Grant obtained a judgment in the amount of fifty one thousand nine hundred twenty four dollars ($51,924.00), plus court costs and possession. However, debtor filed a petition in bankruptcy before the order became final. Grant avers that debtor was some fifty one thousand one hundred seventy four dollars ($51,174.00) in arrears.

On January 14, 1992, debtor filed a "complaint for damages in the Circuit Court of Shelby County naming among others, Grant and Company as a defendant, seeking to enjoin Grant from pursuing the detainer action and seeking to have Grant"perform its contract in accordance with the course of dealings between the parties."

As a threshold matter, the court must determine whether the automatic stay applies to the subject property; that is, whether there is any protectable interest of the debtor in the lease. At the time of the petition filing an automatic stay goes into effect by operation of law which stays all acts against the debtor and the debtor's property. 11 U.S.C. § 362(a). Further, a bankruptcy estate is created. See 11 U.S.C. § 541. Section 362(a) states in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay,

applicable to all entities of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the cause under this title; and

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

Appendix A

Thus, both the debtor and the property of the section 541 bankruptcy estate are protected from creditor action.

On request of a party in interest and after notice and a hearing, the court may grant relief from the stay for cause, including lack of adequate protection. See 1 1 U.S.C. § 362(d)(1). Further, the court may grant relief with respect to property, if such property is not necessary for the debtor's reorganization or there is no equity in the property. See 11 U.S.C. § 362(d)(2).

Thus, creditors may obtain relief from the stay if their interest would be harmed by continuance of the stay. See 11 U.S.C. § 362(d).

Notwithstanding, the automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors.

The subject lease was entered into April 1, 1985, by and between the parties. The first term of the lease was to expire in 1988.[2] The lease provided two, three (3) year renewal terms, and set forth the mechanism for renewal.

Paragraph 32 of the lease states:

> "The lessee shall inform the lessor in writing ninety (90) days prior to the termination of this lease of the lessee's intention to renew or not to renew the space on the terms negotiated."

---

2. The lease did not contain a certain date on which the lease would terminate.

Appendix A

An addendum to the lease styled, "Lease Option" was executed and provides, in relevant part:

> At the end of the first three year lease period, the Lessee has the option to extend the lease period for another three years. The rental rate for this period will be $3,935.00 per month. At the end of this three year period, the Lessee has the option of extending the lease for two more three-year periods. The rental rate for each of these two rental terms will be negotiated, upon notification from the Lessee, that he desires to extend the lease. This notification must be given at least ninety days prior to the termination of the preceding lease period. The rental rate negotiated shall be approximately equal to the market rate for equivalent property, but shall not increase at a rate greater than the increase in the United States Government Consumer Price Index over the period of the preceding lease term. For example, if the Consumer Price Index showed an increase of three percent (3%) two percent (2%), and for percent (4%) for each of the preceding three years, then the rental rate could not increase more than nine percent (9%) for the next lease period. All of the terms of the attached lease will be in force during the additional lease periods.

Debtor testified, and it is undisputed that prior to the end of the first term, debtor orally notified the landlord that it wished to extend the lease. No new written lease was executed, but debtor continued in possession of the lease premises, and landlord continued to accept the rents. The rights of the parties under a

lease of real estate are to be determined by state law. See *In the Matter of Zienel Furniture, Inc.*, 13 B.R. 264 (Bankr. E.D. Wis. 1981); *Butner v. U.S.*, 440 U.S. 48 (1979). Under non-bankruptcy law, where lease term expires and tenant remains in possession with the acquiescence of the landlord, it has been held that the lease renews for a like term. Where the lessee enters into possession of property under a lease for one or more years, and continues to remain in possession after the expiration of the lease, with no agreements as to the terms of any renewal of the lease, the law construes the lessee to have leased the property from year to year, and for either party to cancel the tenancy, notice must be given to the other party at least six months before the end of the given year. *Hayes v. Schweikart's Upholstering Co.*, 55 Tenn. App. 442, 402 S.W. 2d 472 (1965). See also *Hibbard v. Newman*, 61 Tenn. (2 Baxt.) 285 (1872); *Spillman v. Walt*, 59 Tenn. (12 Heisk.) 574 (1873); *Glascock v. Marmon*, 4 Tenn. Civ. App. (Higgins) 140 (1914); *Seward v. Garner*, 19 Tenn. App. 440, 89 S.W. 2d 770 (1935). However, other cases have held that a tenancy at will, a periodic tenancy or a tenancy at sufferance is created. *Ladd v. Riggle*, 53 Tenn. (5 Yer.) 113 (1833) (Tenancy may be inferred from the conversations and actions of the parties — an express contract need not be proven). The instant lease provided at paragraph 14 for a holdover tenancy and states in toto:

> Should Lessee remain on the premises after expiration of this lease agreement, *Lessor shall have the option* to interpret such action as creating a month to month lease at a rental twenty percent (20%) higher than that payable for the last month of the lease term or to consider the holding over a default. Only a new signed lease or extension agreement shall deprive Lessor of the choice of action as outlined above. (Emphasis added)

Appendix A

Landlord seeks to treat the tenancy as a holdover tenancy, however, landlord did not avail itself of the provisions of paragraph 14 as landlord did not advise the tenant that the tenancy was being treated as a holdover tenancy. The landlord treated the tenancy according to the terms of the original lease and the court finds that the lease was renewed at the conclusion of the first lease term.

The law in Tennessee regarding the creation of tenancies after holding over beyond a term is set forth in *Tennessee Jurisprudence* which states:

> *Holding over After Termination of Term.* — A tenant holding over after the expiration of the term continues to occupy the relation of tenant towards his former landlord on the same conditions as those of the preceding term, and he may be held strictly liable to another like term at the election of the landlord. Where the tenant holds over after the termination of a lease and the landlord continues to accept the rent, a new tenancy is created, and, if the original tenancy was for a year or more, the new tenancy is from year to year; if the original term was for less than a year, as a month or a quarter, the new tenancy is presumably a periodic tenancy measured by such period.
>
> Generally, when the landlord accepts rent for a period beyond the term, or by other unequivocal act, declaration or agreement recognizes a continuation of the landlord-tenant relationship there is a presumption that he has chosen irrevocably not to treat the tenant as a trespasser,

> but to recognize his continued right of occupancy. In the absence of facts giving rise to an estoppel, if the tenant indicates his intention by remaining in possession after the lease term, and the circumstances appear to indicate an intention of the landlord not to terminate the relationship the burden is upon the landlord to rebut the presumption of intention to extend the lease beyond the term although the presumption is rebuttable.
>
> A parol lease of land is good under the statute of frauds for one year. If the tenant who is under such a contract holds over a portion of the ensuing year, the landlord may elect to treat him as a tenant from year to year, and recover the value of the premises as upon a lease for a single year; and this relation will continue to exist until reasonable notice is given by one of the parties to the other of an intention to terminate the estate. (citations omitted).

17 Tenn. Juris., Landlord Tenant, § 4.

Landlord avers that even if the lease was renewed, the judgment for possession entered by the state court terminates any interest the debtor had in the lease such that there is no protectable interest for the bankruptcy estate. In *In re Illinois Italian Restaurant Corp.*, 42 B.R. 319 (S.D. N.Y. 1984) the debtor corporation operated a restaurant on leased premises. A summary eviction proceeding was commenced against the debtor by the landlord. Judgment was entered in favor of the landlord and a warrant of eviction was served on the debtor. Prior to the execution

of the warrant, debtor filed a petition under chapter 11. The court found that despite the termination of the debtor's legal interest in a lease, the debtor still had an equitable interest which was a part of the bankruptcy estate and protected by the automatic stay. See also, *In re GSVC Restaurant Corp.*, 3 B.R. 491, aff'd 10 B.R. 300 (S.D. N.Y. 1980); *In re Chuck Wagon Bar-B-Que, Inc.*, 7 B.R. 92 (D.D.C. 1982); contra., *In re Richards Pontiac, Inc.*, 54 B.R. 905 (N.D. Ill. 1985).

Since the petition filing occurred before the state court order became final, the judicial proceedings were stayed even though debtor did not post the statutory bond. See *In re Roxse Homes, Inc.*, 74 B.R. 810 (D. Mass. 1987) where the court held that the issuance of a decision by state appellate court in a case that had been fully argued and briefed prepetition was stayed by the filing of a bankruptcy petition. Thus, the appellate decision rendered postpetition was null and void. Debtor's inability to post the bond is only a factor for the bankruptcy court to consider in determining whether or not cause exists to lift the automatic stay.

Based on the foregoing, the court finds that on the petition filing date, since the state court order had not become final, the debtor had interest in the lease and the lease premises which was protected by the automatic stay.

In the bankruptcy court the debtor enjoys the automatic stay and does not have to post the state statutory bond. Debtor has indicated that he wishes to bring the state court matter into the bankruptcy court by the removal powers under 28 U.S.C. § 1452. On the lease termination issue, the bankruptcy court and the state court have concurrent jurisdiction. However, unless the proceeding is core, the bankruptcy court may not enter a final order. The bankruptcy judge shall determine whether a proceeding is core

or non-core, and such determination should not be made solely on the basis that its resolution may be affected by state law. 28 U.S.C. § 157(b)(3). Even if the proceeding is non-core, the bankruptcy judge may still hear the matter but may not enter a final order absent consent of the parties. 28 U.S.C. § 157(C). Since the lease termination issue is strictly governed by state law, the court finds that this is a non-core proceeding. See *In re Pioneer*, 946 F.2d 445 (6th Cir. 1991). The bankruptcy court is a court of equity and this court will fashion an equitable remedy appropriate to this situation.

This court will exercise sua sponte jurisdiction based on a totality of the facts and circumstances and considering comity and respect for state law. 28 U.S.C. § 1334(c)(1). See also *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976).

The bankruptcy court will exercise permissive abstention as follows:

> 1) the bankruptcy court will allow parties to litigate in state court;
>
> 2) the court will not require the debtor to post the bond as required by the state statute since debtor would not be required to post the bond if debtor litigated in the bankruptcy court;
>
> 3) the automatic stay is modified to permit the parties to proceed and defend these actions in state court;
>
> 4) the parties should seek to consolidate the original action (General Sessions) and the

counterclaim (Circuit Court) in one court;

5) debtor should continue to pay the monthly rent pursuant to the lease terms;

6) debtor should keep the necessary insurance on the premises as the lease provides; and

7) within sixty (60) days of this order, the debtor should file a disclosure statement and a summary of a proposed plan which plan proposal may be based on assumptions regarding the state court litigation.

The bankruptcy court reserves determination of the issues related to assumption or rejection under section 365.

CONCLUSION

Based on all of the foregoing and the case record as a whole, the court exercises sua sponte discretionary abstention to allow the debtor and Grant to litigate the original action as appealed and the counterclaim in state court without the requirement of the debtor posting a bond. The court finds that on the petition filing date, the debtor had a leasehold interest which is a part of the section 541 bankruptcy estate.

The motion to lift the automatic stay is denied and the court exercises sua sponte abstention.

IT IS SO ORDERED

Appendix A

s/ Bernice B. Donald
BERNICE B. DONALD, JUDGE
UNITED STATES
BANKRUPTCY COURT
DATE: 3-10-92

cc:

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APPENDIX B — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DISTRICT IN *IN RE SAV-A-LOT AUTOMOTIVE #2, INC.*

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

Sav-A-Lot Automotive #2, Inc. Case No. 92-21165-D

Debtor. Chapter 11

Sav-A-Lot Automotive #2, Inc.,

Plaintiff,

vs. Adversary No. 92-0194

Paul Tashie, Auto Radio, Inc.,
Peter Tashie, and NT Investments, Ltd.,

Defendants.

ORDER DENYING DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER

This cause came on for hearing on the motion of debtor, Sav-A-Lot Automotive #2, Inc., ("Sav-A-Lot") seeking a temporary restraining order ("TRO") on four (4) bases. The court observed that in order for relief to be granted, the movant must prevail under F.R.Civ.P. 65 made applicable to the bankruptcy court by F.R.B.P. 7065. The court heard argument on the motion

for TRO subject to an objection to subject matter jurisdiction made at the outset by defendants. See *In re Pioneer*, 946 F.2d 445 (6th Cir. 1991).

This court concedes that on a lease termination issue, the bankruptcy court does not have jurisdiction to enter a final order as it is a non-core proceeding. *Pioneer, supra*. However, the bankruptcy court makes the determination of what is core and what is non-core. See 28 U.S.C. § 157(b)(3). Even where the bankruptcy court finds that a matter is non-core, the court is not deprived of jurisdiction to hear the matter so long as it arises out of, or is related to the bankruptcy case, the court simply may not enter a final order absent consent of the parties. 11 U.S.C. § 157.

However, because the issues raised in the motion for TRO relate directly to the administration of the bankruptcy estate, the court finds that the proceeding is core. See 28 U.S.C. § 157(b)(2)(A).

The court made oral findings and conclusions on three (3) of the four (4) bases at the conclusion of the hearing and left open only the issue which sought to prohibit defendants from removing the trailer and its contents from their current location.

After considering argument of counsel, evidence in the record, and the case record as a whole, the court finds the automatic stay protects the debtors interest in property no matter where such property is located. 11 U.S.C.§ 362(a). Therefore, NT investments and the Tashies may not exercise control over any property belonging to the debtor without obtaining relief from the bankruptcy court pursuant to 11 U.S.C. § 362(d).

Appendix B

After reviewing the lease assignment, and based on the testimony of the witness, Mr. Tashie, the rights in the trailer are uncertain. Therefore, some determination of those rights must be made. However, until such determination is made, inasmuch as the debtor is claiming the trailer as property of the section 541 bankruptcy estate, the property in the trailer as well as the trailer is protected by the automatic stay and therefore no further injunction is required.

The bankruptcy code at 11 U.S.C. § 362(h) provides for the punitive damages for violation of the automatic stay.

Based on all the foregoing and pursuant to F.R.B.P. 7052, the debtor's motion for temporary restraining order is denied; however, the automatic stay prohibits the exercise or control of the trailer which is deemed property of the bankruptcy estate until some further determination is made.

IT IS SO ORDERED

s/Bernice B. Donald
BERNICE B. DONALD, JUDGE
UNITED STATES
BANKRUPTCY COURT

DATE: 3-10-92

cc:

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REPLY

BRIEF

(5)

No. 91-1625

Supreme Court, U.S.
FILED
MAY 28 1992
THE CLERK

In The

Supreme Court of the United States

October Term 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER TO BRIEF IN OPPOSITION FOR RESPONDENT PIONEER INVESTMENT SERVICES COMPANY

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On May 12, 1992, petitioner, The Cain Partnership, Ltd. (hereinafter "Partnership") received the brief in opposition (hereinafter "Debtor's Brief") from Pioneer Investment Services Company (hereinafter "Debtor").

REPLY

At base, what Debtor argues, as well it must, in defense of what occurred below, is set out in Debtor's Brief p. 8. The only real position of Debtor is that Congress has plenary power over bankruptcy matters and whatever Congress wants to do about bankruptcy matters is the business of Congress, and the Judicial Branch ought to stay out of the way. The essence of Debtor's argument is that, if the Court, gets in the way of Congress by imposing other constitutional requirements on the exclusive right of Congress, under Article I § 8, cl. 4, to regulate bankruptcy matters, the Court will have turned one part of the Constitution on the other part of the Constitution, and Congress will no longer be the sole constitutional authority over bankruptcy matters.

According to Debtor, Congress must be given free reign to trample on Article III and the Tenth Amendment so long as it does so under the banner of bankruptcy. The Court has already decided that this, the only real argument of Debtor, is hollow and, therefore, rejected it. *Right v. Union Central Life Insurance,* 304 U.S. 502 (1938), *reh. den.,* 305 U.S. 668 (1939).

In essence, what the courts below have done in the case *sub judice* is buy into the only real argument of Debtor. The result is that, without so stating, Article I § 8 cl. 4 has been used to overrun the protections which Article III and the Tenth Amendment guarantee the Partnership.

Debtor's Brief is a tribute to its authors' advocacy skills in that, when one reads it, the tendency is to back off and admire

it as something with appeal. The fact that it is a collage of *non sequiturs* and irrelevancies is overshadowed by the skill with which the *non sequiturs* and irrelevancies have been stuck together as if on canvas. The thoughts which make up Debtor's Brief are, when studied, not helpful to the Court.

On reading Debtor's Brief, one is impressed with how important Debtor considers it to be to divert the Court's attention from what is before it to something which is of no consequence. The only issue here is whether the courts below mishandled the proceeding initiated by the Partnership's motion to lift the automatic stay. Yet, throughout Debtor's Brief, the "proceeding" which Debtor attempts to cast as the one under review is that initiated by Debtor's 11 U.S.C. § 365(c)(3) motion to assume. This is Debtor's attempt to bootstrap in order to destroy Debtor's strawman.

The hope of Debtor is to create a federal question determinable by federal rule of decision. From this false foundation, Debtor moves to adopt reasoning [Mackabe, *The Federal Magistrate Act of 1979,* 16 Harv. J. Legis. 343, 374-379 (1979); Silberman, *Masters and Magistrates Part II: The American Analogue,* 50 N.Y.U. L. Rev. 1297, 1350-54 (1975); Comment, *An Adjudicative Role For Federal Magistrates in Civil Cases,* 40 U. Chi. L. Rev. 584 (1973); *Wharton-Thomas v. United States,* 721 F.2d 922, 925-926 (3rd. Cir. 1983)] which, at least *sub silentio,* produced the sometimes seemingly anomalous decisions in *United States v. Raddatz,* 447 U.S. 667 (1980); *Peretz v. United States,* 501 U.S. ____, 115 L. Ed 2d 808, 111 S. Ct. ____ (1991).

This approach, but only this approach, permits Debtor to overcome that which otherwise defeats Debtor, *i.e.,* that resolution as to which should prevail as between the vying claims of the Partnership and Debtor is based one hundred percent on nothing other than the common law of Tennessee.

While jurisdiction over whether a debtor will be allowed or denied the opportunity to assume an unexpired lease is a question over which a bankruptcy court most often has jurisdiction, this, too, is not a foregone conclusion. For instance, if the sole determinative question as to whether a debtor will be allowed or denied the opportunity to assume is whether the lease is or is not expired and that question is determinable only and alone by state law, then, there exists a prerequisite issue for determination which the bankruptcy court has no jurisdiction to adjudicate.

This comports with the context below. The objection of the Partnership to Debtor's motion to assume was conditional, *i.e.*, if the Colonial Lease did not expire prepetition, the Partnership had no objection to assumption. Thus, the sole determinative question below was whether the lease had expired prepetition. The error below was that the bankruptcy court took it on itself to adjudicate this prerequisite question.

This is illustrative of how Debtor attempts, by labels, to change the issue presented by the instant petition, into one Debtor needs in order to prevail. Debtor errs in arguing here that all that is needed to change substance is to call the thing something different from what it really is.

For instance, Debtor admits that it is "crucial" (Debtor's Brief pp.20-21), if Debtor is to escape the sure-to-be consequence of the Sixth Circuit, *ex post facto,* conjuring up implied consent to permit the bankruptcy court to adjudicate what was ruled by the Sixth Circuit, *ex post facto,* to be a noncore proceeding. Debtor must first have the Court label the "proceeding" below as one to assume the lease, then, having the benefit of this label, to label it, further, as a "contested matter" instead of an "adversary proceeding." If these parts are so labeled, the argument goes, they can then be used to build the platform on which all that occurred below can be labeled "core." Then Debtor can leave

it to be deduced that the Sixth Circuit erred in its noncore analysis, but say of the error: So what? The Sixth Circuit's opinion, on this construct, just becomes another right decision made for the wrong reason.

The conflict in the circuits over the need for express consent in order for a bankruptcy court to "hear and determine" a noncore proceeding is as real a split as ever there has been, and its adverse impact on the *unified* system of bankruptcy courts could not be more potentially disconcerting.

The Sixth Circuit, by its *ex post facto* (but, to the extent it admits a lack of jurisdiction of the bankruptcy court, right) declaration that the proceeding below was noncore, implicates the requirements under 11 U.S.C. § 157(c)(2) for consent to be effective. Both *In re: Bricknell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991) and *The Home Insurance Company v. Cooper & Cooper, Ltd.*, 899 F.2d 746 (7th Cir. 1989) involved exactly the same statute and exactly the same issue and came to exactly the opposite decision as the Sixth Circuit below. All three cases have been decided since the Court, in 1987, effectuated Bankruptcy Rule 7012(b) and Rule 7008, seemingly, in response to the Ninth Circuit opinion in *In re: Daniels-Head & Associates,* 819 F.2d 914 (9th Cir. 1987) which held that implied consent was enough.

The reason why the Court found need for Bankruptcy Rule 7012(b) and Rule 7008, to combat jurisdiction by ambush [*In re: J.T. Moran Financial Corp.*, 1991 Bankr. LEXIS 34, 21 Bankr. Ct. Dec. (CRR) 330 (Bkrtcy S.D.N.Y. 1991)] which results from cases like *In re: Daniels-Head, supra,* and *In re: Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987) and *In re: Men's Sportswear, Inc.*, 834 F.2d 1134 (2nd Cir. 1987), evidently, is to prevent what occurred below.

That is, not until it was too late to decide which to elect one

from among the options (Pet. pp. 25-26) which the Partnership had, was the Partnership informed of the noncore determination by the Sixth Circuit and, this, in complete contravention of what the Partnership had been previously told by the determinations of the courts below.

Whether the proceedings out of which these situations arise are, technically, "contested matters" or "adversary proceedings" could not be of less importance to the rights at issue. Yet, Debtor deems this distinction "crucial" to its case.

Debtor has attempted to convince the Court that, contrary to the holding of the Sixth Circuit below, the Partnership did not merely consent by implication (by its failure to speak in a different way than it spoke); instead, Debtor claims that the Partnership expressly consented (Debtor's Brief pp. 4, 7-8).

In reply to this insistence, the Partnership would point out that, though Debtor and all of the other respondents have previously briefed this issue in the courts below, neither Debtor nor any other respondent has suggested that what Debtor here contends to be evidence of the Partnership's "express" consent, in fact, evidences same. This is a new-found idea.

The Sixth Circuit had before it the record of the proceedings below and the benefit of vigorous argument of Debtor and the other respondents. The Sixth Circuit, obviously, combed the record in search of any evidence it might find to enable it to reason on the premise that the Partnership *expressly* consented.

On September 19, 1991, the Sixth Circuit initially issued its opinion (Pet. App. V p. 93a) including a conclusion that the Partnership had expressly consented.[1] On October 21, 1991, the

---

1. This initial opinion on September 19, 1991 is the only opinion of the (Cont'd)

Sixth Circuit, *sua sponte,* recalled its September 19, 1991 opinion (Pet. App. X p. 104a). On October 28, 1991, the Sixth Circuit amended the September 19, 1991 opinion by withdrawing its conclusion therein with respect to the Partnership "expressly" consenting (Pet. App. Y p. 105a-106a).

The opinion of the Sixth Circuit which the Partnership seeks here to have reviewed is the amended opinion (Pet. App. Z p. 107a) which extracts (after careful review of the record relative to the precise point of "express" consent) a previously reached conclusion that there was express consent.

Also, Debtor ignores that the bankruptcy judge, himself, when considering how to rule on the Partnership's Rule 60(b) post-judgment motion, did not even allude (Pet. App. O p. 77a and App. P p. 78a), indirectly, to any notion that the Partnership had expressly consented. The brief in support of the Partnership's motion for relief from stay (Debtor's Brief p. 4 footnote 1) was freshly before the bankruptcy court. The reason the bankruptcy judge, obviously, did not consider the document posited by Debtor here as evidence of *express* consent to be such evidence is because it is such evidence.

The document on which Debtor places reliance, but which neither the bankruptcy court, the district court nor the Sixth Circuit found to be evidence of *express* consent, bears comment. It (Debtor's Brief p. 4 footnote 1, Debtor's Brief Appendix A p. 1) was filed the exact same day as the motion to lift the stay and well-before there was any response indicating that, when the motion and law supporting it was considered, there would be

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(Cont'd)

Sixth Circuit which is reported in the National Reporter System and appears at 946 F.2d 445; however, this opinion by the Sixth Circuit is outdated by the Sixth Circuit's October 28, 1991 amendment discussed *infra*.

opposition. Thus, at the time the memorandum (Debtor's Brief p. 4, footnote 1; 7-8) was filed, the proceeding initiated by the motion to lift the stay was uncontested.

It is true that there later developed a dispute. It, also, is true, from the previously filed motion to assume, that a dispute was anticipated. But, until a dispute developed (after consideration of the basis for the motion to lift the stay and the authorities), the Partnership did not know, for certain, that there would be opponents who would vie with the Partnership in face of the authority presented by the memorandum.

Also, the motion and memorandum presented changed circumstances which, if Debtor had chosen to take advantage thereof, could have produced a settlement between the Partnership and Debtor, and united them[2] against a common adversary. Therefore, when the memorandum was filed, the Partnership could not know, for sure, that a dispute over whether the lease had terminated prepetition would eventuate.

It is this set of circumstances, well known to the bankruptcy judge and Debtor, which is the context which produced the language referred to in Debtor's Brief p. 4, footnote 1; 7-8. The statement by the Partnership that the bankruptcy court had "sufficient jurisdiction," encouraging the bankruptcy court to exercise "that jurisdiction," is specifically stated to be jurisdiction

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2. Debtor and respondents, Fleet National Bank and First National Bank of Louisville, were parties to an escrow agreement with Valley Fidelity Bank & Trust Company which required Valley Fidelity Bank & Trust Company to use escrow funds on deposit to pay the real property taxes required to be paid by the Colonial Lease. It was the breach by Valley Fidelity Bank & Trust Company of the escrow agreement, by its failure to pay the real property taxes it contracted to pay, which caused the default under the Colonial Lease which was the basis for the motion by the Partnership to lift the stay and repossess the property [Pet. App. A p. 3a ¶ g(1); p. 4a ¶ g(2)-¶ g(6)].

"over Debtor." The language quoted from the Partnership's memorandum specifies the scope of the "sufficient jurisdiction," *i.e.*, "to require the turnover [of the leased premises]." It is absolutely true that the bankruptcy court had such jurisdiction. Debtor had "submitted" [*Langenkamp v. Culp*, ____ U.S. ____, 111 S. Ct. 721, 112 L. Ed. 2d 709, 1991 U.S. LEXIS 271 (Jan. 7, 1991)][3] itself and all that it claimed to be its property to the jurisdiction of the bankruptcy court and to take what Debtor claimed as its property and enter orders to reorganize Debtor.

Also, Debtor listed its claim to the leasehold as an asset of Debtor. Debtor could not claim that the Colonial Lease leasehold was not part of the "property" which 11 U.S.C. § 541 made part of the bankruptcy estate.

Thus, what the Partnership said about the jurisdiction of the bankruptcy court, *i.e.*, that it was "sufficient" to order Debtor to abandon its claim to the property demised by the lease, seems self-evident; yet, the fact that the bankruptcy court has such jurisdiction in no way compromises the position of the Partnership that the bankruptcy court had no jurisdiction to adjudicate concerning what, thereafter, developed into a dispute as to which, between them, had the superior right to immediate possession of the property.

The statement by the Partnership that, for the bankruptcy judge "to refer the matter to state court would be necessary" is in the same context, *i.e.*, because Debtor had submitted itself and what it claimed to be its property to the bankruptcy court for adjudication, a writ of possession from the state court would

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3. Notably, the Court avoided use of the word "consent" at any point in the *Langenkamp* opinion apparently making certain that the opinion could never be cited as authority for the proposition that a bankruptcy court can gain otherwise non-existent jurisdiction by consent.

be unnecessary as the only means by which to dispossess Debtor of its claim.

Because Debtor had assumed the role of trustee over the property, *an order requiring abandonment* by Debtor, even if there existed no vying claims between Debtor and the Partnership was required, *i.e.*, Debtor could not just surrender the property to the Partnership. But, for the bankruptcy court to send the Partnership and Debtor to state court to get a writ of possession, by consent, would have been unnecessary since, there being no dispute, the bankruptcy court would have had all of the jurisdiction necessary to get the property into the hands of the Partnership.

Similarly, the observation (referred to in Debtor's Brief p.4 footnote 1) that the Partnership stated "[I]f this court determined that the Lease was terminated prior to" the date on which Debtor filed its voluntary petition, then, no lease existed must be given meaning in the same context. That is, before the bankruptcy court could justify, in light of the obligation of the bankruptcy court to the creditors, ordering Debtor to abandon its claim of right to the property, it would be necessary for the bankruptcy court to determine that the lease terminated prior to the date on which Debtor filed its petition. However, this determination might well have been made in a context where no dispute was presented.

Once Debtor filed an opposition to the claim of right of the Partnership, it became clear that a non-adjudicated resolution of the dispute could not be accomplished. In this markedly changed context, the jurisdiction of the bankruptcy judge had to be assessed in light of completely different principles of law. Then, mutually inconsistent claims of right were being asserted and were subject to resolution by no means other than plenary adjudication.

What had to be adjudicated was whether what the Partnership advocated concerning the law of Tennessee or what Debtor

advocated concerning the law of Tennessee or something other than what either advocated was the law of Tennessee, concerning leases governed by the law of Tennessee, was, truly, the law of Tennessee.

After it became evident that a dispute existed which had no way of being resolved except by an adjudication concerning what Tennessee law required in the circumstances, the Partnership never expressed itself (nor is there any claim that it did) subject to interpretation or misinterpretation as a statement that the Partnership consented to the bankruptcy court adjudicating the dispute.

Added to this is the fact that the law treats a motion to lift the stay as inherently being a challenge to the subject matter jurisdiction of the bankruptcy court (Pet. p. 26).

Seen in light of the foregoing analysis, it becomes pluperfectly clear why Debtor did not advance what it posits before this Court as evidence of express consent by the Partnership, for the same proposition below. Likewise, it is equally clear why neither the Sixth Circuit nor the district court nor the bankruptcy court ever attributed, as evidence of express consent, the statements argued here by Debtor, to be evidence of express consent. Debtor simply has taken from their context certain statements by the Partnership hoping it would be able to implant those statements in a foreign environment and cause them to take on life which, all concerned below, knew the statements never had.

Respectfully submitted,

LARRY E. PARRISH
Attorney for Petitioner